Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-371

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN J. RISKO, JR.,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

On Petition For Writ of Certiorari
to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM H. PLATT
DISTRICT ATTORNEY
Lehigh County Courthouse
P.O. Box 1548
Allentown, PA 18105
(215) 820-3100

Attorney for Respondent

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

16 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Was Petitioner, who was ultimately convicted by a jury of various thefts from his employer, the City of Allentown, denied due process of law (1) when he was re-arrested on these charges after they were dismissed by a magistrate's finding of no *prima facie* case or (2) after a new magistrate was assigned to the preliminary hearing after re-arrest on motion of the Commonwealth and on request of the first magistrate who asked to be recused?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENIAL OF THE WRIT 3

I. RE-ARREST AFTER A DISCHARGE AT A PRELIMINARY HEARING IS PERMITTED BY THE LAW OF PENNSYLVANIA, A MAJORITY OF STATES AND BY A DECISION OF YOUR HONORABLE COURT 3

II. THE ASSIGNMENT OF A NEW MAGISTRATE TO HEAR THE CASE AFTER RE-ARREST WAS NOT A CHANGE OF VENUE, BUT A RE-ASSIGNMENT BECAUSE THE FIRST MAGISTRATE ASKED TO BE REMOVED; THE PROSECUTION ALSO REQUESTED ASSIGNMENT BY THE COURT OF ANOTHER MAGISTRATE, AND DEFENDANT RECEIVED NOTICE AND WAS AFFORDED AN OPPORTUNITY TO BE HEARD 4

III. PETITIONER HAS FAILED TO ALLEGE ANY PREJUDICE OR HARMFUL ERROR; THE JURY VERDICT, BASED UPON SUFFICIENT EVIDENCE, SERVES TO CURE ANY ERROR REGARDING BINDOVER 6

CONCLUSION 6

APPENDIX

EXCERPTS FROM OPINION OF PA. SUPERIOR COURT A-1

EXCERPTS FROM OPINION OF LEHIGH COUNTY COMMON PLEAS COURT A-3

TABLE OF AUTHORITIES

Cases: Page

Commonwealth v. Genovese, 493 Pa. 65, 425 A.2d 367 (1981) 3

Commonwealth v. Hetherington, 460 Pa. 17, 331 A.2d 205 (1975) 4

Commonwealth v. Prado, 481 Pa. 485, 393 A.2d 8 (1978) 4

Commonwealth v. Risko, ___Pa. Super. ___, 473 A.2d 651 (1984) 1

Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) 6

McNair's Petition, 324 Pa. 49, 187 Atl. 498, 106 A.L.R. 1373 (1936) 4

United States ex rel. Rutz v. Levy, 268 U.S. 390, 45 S.Ct. 516, 69 L.Ed. 1010 (1925) 3

United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) 6

CONSTITUTIONAL PROVISIONS:

Art. 1, §10, Pa. Constitution 3, N.3

STATUTES:

Pa. Rules of Conduct, Office Standards and Civil Procedure for District Justices, Rule 17 ..... 2, N.2

Pa.R.Crim.P. 23 ..... 4, 5

TEXTBOOKS:

2 W. LaFave & J. Israel, *Criminal Procedure* (West Pub. Co. 1984) §14.3(b) 3

No. 84-371

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN J. RISKO, JR.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition For Writ of Certiorari
to the Supreme Court of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

Respondent, Commonwealth of Pennsylvania, respectfully requests that your Honorable Court deny the Petition for a Writ of Certiorari seeking review of the decision of the Supreme Court of Pennsylvania in this case entered on June 28, 1984, and denying an allowance of appeal from the *per curiam* decision of the Superior Court of Pennsylvania reported at ____ Pa. Super. ____, 473 A.2d 651 (1984).[1]

1. The Memorandum Opinion of the Pennsylvania Superior Court filed herein is actually an unreported opinion; the above ci-

COUNTERSTATEMENT OF THE CASE

Petitioner was convicted by a jury of various thefts from his employer, the City of Allentown, which had employed him as the head parts clerk in the City's Municipal Garage. The first criminal complaint against Petitioner was filed on October 18, 1979, and it was dismissed by a magistrate who, after a preliminary hearing, found no *prima facie* case was established. Petitioner was re-arrested on the charges and another magistrate was assigned by the President Judge[2] to preside at the second preliminary hearing because the Commonwealth had requested it and because the magistrate who held the first hearing had asked to be recused from the second.

At the second preliminary hearing, contrary to the allegations of Petitioner's Brief, additional evidence was presented by the Commonwealth to establish a *prima facie* case, namely testimony by a police officer, Detective Thomas Bennis, that Petitioner admitted to having purchased automobile parts in the name of the City for his own use.

Petitioner has never been incarcerated on these charges and has continuously from his first arrest been on bail, as he is now pending your Honorable Court's resolution of his petition.

NOTES *(Continued)*

tation reports only the affirmance of the trial court. The pertinent portions of the Superior Court Memorandum Opinion and the Trial Court Opinion are reproduced in the Appendix to this Brief.

2. In Pennsylvania, the President Judges of the Courts of Common Pleas have supervisory responsibility over the minor judiciary within their respective common pleas judicial districts. Rule 17, Pa. Rules of Conduct, Office Standards and Civil Procedure for District Justices.

REASONS FOR DENYING THE WRIT

I. RE-ARREST AFTER A DISCHARGE AT A PRELIMINARY HEARING IS PERMITTED BY THE LAW OF PENNSYLVANIA, A MAJORITY OF STATES AND BY A DECISION OF YOUR HONORABLE COURT.

As noted in W. LaFave & J. Israel *Criminal Procedure* §14.3(b) (West Pub. Co. 1984), in jurisdictions where a grand jury is unavailable,[3]

> ". . . the prosecutor may refile the complaint and attempt to obtain a bindover at a subsequent preliminary hearing (possibly before a different magistrate). Since the preliminary hearing dismissal is prior to the attachment of jeopardy, there is no constitutional bar against reinstating proceedings.
>
> Several state courts have maintained that refiling undermines the magistrate's authority and should not be permitted unless the prosecution offers substantial 'new evidence.' The majority, however, reject that position and permit refiling on the same evidence, absent proof that the prosecutor's purpose is to harass the defendant." (Footnotes omitted throughout.)

LaFave and Israel, at note 37, p. 260, cite as authority for the lack of any constitutional bar to re-arrest, *United States ex rel. Rutz v. Levy*, 268 U.S. 390, 45 S.Ct. 516, 69 L.Ed. 1010 (1925), and numerous state court decisions.

Pennsylvania, contrary to the assertions in Petitioner's Brief, is clearly in the majority which does not require "new evidence" to justify a re-arrest. See *Commonwealth v. Genovese*, 493 Pa. 65, 69 n. 7, 425 A.2d

3. Indicting grand juries were abolished in Lehigh County, where this prosecution arose, and in most Pennsylvania counties pursuant to an Amendment to Art. 1, §10 of the State Constitution adopted November 6, 1973.

367, 369 n. 7 (1981); *Commonwealth v. Prado*, 481 Pa. 485, 487, 393 A.2d 8, 9 (1978); *Commonwealth v. Hetherington*, 460 Pa. 17, 331 A.2d 205 (1975); *McNair's Petition*, 324 Pa. 49, 187 Atl. 498, 106 A.L.R. 1373 (1936).

II. THE ASSIGNMENT OF A NEW MAGISTRATE TO HEAR THE CASE AFTER RE-ARREST WAS NOT A CHANGE OF VENUE, BUT A RE-ASSIGNMENT BECAUSE THE FIRST MAGISTRATE ASKED TO BE REMOVED; THE PROSECUTION ALSO REQUESTED ASSIGNMENT BY THE COURT OF ANOTHER MAGISTRATE, AND DEFENDANT RECEIVED NOTICE AND WAS AFFORDED AN OPPORTUNITY TO BE HEARD.

This matter is fully discussed in the excerpt from the Trial Court's Opinion reproduced in the Appendix to this Brief in Opposition.

A new magistrate was assigned to hear this case on re-arrest on January 2, 1980, and the defendant was given notice and an opportunity to be heard. Pennsylvania Rule of Criminal Procedure 23, which governs Continuous Availability and Temporary Assignment of Issuing Authorities, has since that time been clarified by amendment effective January 1, 1984. The Rule amendments are indicated by underlining the additions:

> "(a) The president judge of each judicial district shall be responsible for insuring the availability at all times within his judicial district of at least one issuing authority.
>
> (b) The president judge may assign temporarily the issuing authority of any magisterial district to serve another magisterial district whenever such assignment is needed to satisfy the requirements of paragraph (a), to insure fair and impartial proceedings, or otherwise for the efficient administration of justice.

One or more issuing authorities may be so assigned to serve one or more magisterial districts.

(c) Whenever a temporary assignment is made under this Rule, notice of assignment shall be filed with the Clerk of the Court of Common Pleas where it shall be available for police agencies and other interested persons.

(d) A motion may be filed requesting temporary assignment under paragraph (b) on the ground that the assignment is needed to insure fair and impartial proceedings. Reasonable notice and opportunity to respond shall be provided to the parties."

As noted in the *Comment* to Rule 23, concerning the amendment:

"The motion procedure of paragraph (d) is intended only to apply when a party requests temporary assignment to insure fair and impartial proceedings. The president judge may, of course, order a response and schedule a hearing with regard to such a motion.

The motion procedure is not intended to apply in any of the many other situations in which president judges make temporary assignments of issuing authorities; in all other situations the president judge may make temporary assignments on their own motion without any motion, notice, response, or hearing."

The procedures employed in the case at bar, it is submitted, would comply with the amended and clarified Pennsylvania Rule of Criminal Procedure. A notice was filed and served upon Petitioner and arguments were held before a common pleas judge who conferred thereafter with the President Judge who made the re-assignment. In light of the first magistrate's desire to be recused, no hearing would have been necessary even under the 1984 Rule Amendment.

III. PETITIONER HAS FAILED TO ALLEGE ANY PREJUDICE OR HARMFUL ERROR; THE JURY VERDICT, BASED UPON SUFFICIENT EVIDENCE, SERVES TO CURE ANY ERROR REGARDING BINDOVER.

Petitioner has been on bail for the entire length of these proceedings from his first arrest and now pending action on his petition for certiorari. Error in bindover, in light of the jury verdict based on evidence whose sufficiency is not herein challenged, could only be prejudicial if Petitioner were incarcerated pre-trial. See *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1978).

The situation here, assuming *arguendo* any merit in Petitioner's claims, is analagous to that of an illegal arrest not barring a subsequent prosecution or voiding an otherwise valid conviction. See *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

DATED: December 17, 1984

Respectfully submitted,

WILLIAM H. PLATT
DISTRICT ATTORNEY
Lehigh County Courthouse
P.O. Box 1548
Allentown, PA 18105
(215) 820-3100

Attorney for Respondent

APPENDIX

EXCERPTS OF RELEVANT PORTIONS OF MEMORANDUM OPINION OF PENNSYLVANIA SUPERIOR COURT FILED MARCH 2, 1984

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN J. RISKO, JR., *Appellant*	:	NO. 213 Philadelphia, 1982

Appeal from the Judgment of Sentence of the Court of Common Pleas of Lehigh County, Criminal, at No. 87-1980.

BEFORE: MCEWEN, BECK and HOFFMAN, JJ.

MEMORANDUM OPINION:

* * *

[Slip Opinion, p. 9]

We have conducted a careful and thorough review of the entire record, as well as the briefs of the parties, and conclude that the court *en banc,* specifically, the distinguished Judges Maxwell E. Davison, James N. Diefenderfer and Kenneth H. Koch, has, in its able opin-

ion, provided for a proper disposition of the remaining issues presented by appellant.[3]

Judgment of sentence affirmed.

---

3. The remaining issues, as set forth in the statement of issues presented in the brief of appellant, are:

> I. Whether or not the defendant was denied the due process of law and placed in double jeopardy in violation of the Pennsylvania and United States Constitutions where the prosecution refiled without further evidence criminal charges which were originally dismissed for want of a prima facie case merely in order to submit the same evidence to a different district magistrate?
>
> II. Whether or not the defendant was denied due process of law under the Pennsylvania and United States Constitutions where the Commonwealth's motion for change of venue was presented — and opposed by the defendant — in front of one judge, and without explanation, the motion was acted upon by another judge?

EXCERPTS OF RELEVANT PORTIONS
OF OPINION OF
THE COURT OF COMMON PLEAS OF
LEHIGH COUNTY, PENNSYLVANIA
FILED SEPTEMBER 9, 1981

COURT OF COMMON PLEAS OF LEHIGH COUNTY
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 87 of 1980
JOHN J. RISKO, *Defendant*	:	

* * *

APPEARANCES:

MICHAEL E. MOYER, ESQUIRE, ASSISTANT DISTRICT ATTORNEY, with him, WILLIAM H. PLATT, ESQUIRE, DISTRICT ATTORNEY,
On behalf of the Commonwealth.

JAMES L. HEIDECKER, JR., ESQUIRE,
On behalf of the Defendant.

* * *

OPINION OF THE COURT EN BANC

MAXWELL E. DAVISON, Judge.

* * *

[Slip. Opinion, pp. 2-7]

In support of his motion, the defendant essentially assigns as error the following: (1) the Court's refusal to grant his pre-trial motion challenging the change of mag-

isterial venue[1] and (2) the Court's denial of his pre-trial applications to quash the magistrate's return and information. Even though the defendant also challenges the sufficiency of the evidence and certain rulings of the Court in his motion, he neither briefed nor argued these points in any manner. Accordingly, we deem the unaddressed issues waived. *See Commonwealth v. Dessus*, 262 Pa. Super. Ct. 443, 396 A.2d 1254 (1978).

Claiming initially a violation of his constitutional right to procedural due process of law, the defendant contends that the Court erred in granting the Commonwealth's motion to change magisterial venue. Moreover, because the Commonwealth only submitted an affidavit executed by an assistant district attorney in support of its motion, the defendant further argues that no evidence sufficiently demonstrated the "substantial prejudice" required for a venue change under Pa.R.Crim.P. 25(b). We disagree with both contentions.

First, President Judge Coyne's Order of January 2, 1980, in no way stemmed from an ex parte proceeding: the Court granted the Commonwealth's motion only after notice and a hearing on December 28, 1979,[2] in which the prosecutor and defense counsel participated. Although defense counsel chose to present no counter-affidavit[3] or other evidence at this hearing, he broadly contested "certain factual allegations" in the Commonwealth's motion and specifically challenged the Common-

1. Since the defendant objected to the purported change of venue before the completion of the preliminary hearing, his objection has not been waived. *See* Pa.R.Crim.P. 25(a).

2. In order to avoid any possible confusion, we note that The Honorable James N. Diefenderfer, who heard argument on the Commonwealth's motion on December 28, 1979, took the matter under advisement in order to consult with the President Judge. Judge Coyne issued an Order in this matter on January 2, 1980.

3. Notably, defense counsel was given notice of the Commonwealth's intention to present the motion for a change of venue as well as a copy of the motion. Therefore, a counter-affidavit could have been filed.

wealth's two-fold assertion that a prima facie case had been established at the initial preliminary hearing and that additional evidence would be presented at the subsequent hearing to establish such a case further. Because the defendant enjoyed and obviously utilized his right to object and argue against the Commonwealth's motion at this juncture, any allegation concerning a potential due process infirmity clearly lacks merit.

Second, the ruling of January 2, 1980, violated no magisterial venue rules. Specifically, Pa.R.Crim.P. 21 prescribes that criminal proceedings be brought either before the issuing authority for the magisterial district where the offense allegedly occurred or before an *issuing authority on temporary assignment to serve such a magisterial district.* Case law similarly defines venue as the proper forum for bringing or hearing an action. See *Commonwealth v. Shaheen*, 257 Pa. Super. Ct. 393, 390 A.2d 1294 (1978) (per Hoffman, J. with two judges concurring and one concurring in result), *aff'd sub nom. Commonwealth v. Ryan*, 484 Pa. 602, 400 A.2d 1264 (1979); *Commonwealth v. Ziegler*, 251 Pa. Super. Ct. 147, 380 A.2d 420 (1977). Notably, under Pa.R.Crim.P. 25(b), no objection to venue—meaning change of venue—shall be permitted unless substantial prejudice will result from the cases's continuing with the issuing authority before whom it was brought.

As reflected by the return, district justice Maura conducted the hearing in question at magisterial district 31-1-04, the proper district for bringing this criminal proceeding. Therefore, we conclude that the President Judge, in granting the Commonwealth's motion, merely exercised his authority to *assign* the case to another district justice. Because no actual change of venue occurred, we find the defendant's argument—that the Commonwealth failed to demonstrate the requisite "substantial prejudice" for a change of venue under Pa.R.Crim.P. 25(b)—unpersuasive.

Furthermore, we deem the Court's temporary assignment of district justice Maura to this case appropriate. Under Pa.R.Crim.P. 23, the President Judge of a judicial district may temporarily assign the issuing authority of any magisterial district to serve another district where such assignment becomes necessary for the *efficient administration of justice.*[4]

Unequivocally, according to *Commonwealth v. Hetherington*, 460 Pa. 17, 331 A.2d 205 (1975) and *Commonwealth v. Prado*, 481 Pa. 485, 393 A.2d 8 (1978), the Commonwealth enjoyed the right to refile charges against the defendant before any magistrate authorized to hear the case, even though the original complaint had been dismissed. Because the assistant district attorney handling this case also represented to the Court that district justice Beck preferred not to hear the case again, the Order temporarily assigning a district justice properly and expeditiously resolved the matter.[5] Furthermore, it is clear that the drafters of the Rules of Criminal Procedure did not contemplate the dismissal of proceedings at the magisterial level by reason of improper venue. Indeed Pa.R.Crim.P. 25(c) prohibits such dismissal for improper venue.

---

4. Tangentially, the defendant argues that he first received notice of the Order dated January 2, 1980 at the preliminary hearing, which was held on January 7, 1980. Under Pa.R.Crim.P. 23(a), however, notice of such a temporary assignment need only be placed on file with the Clerk of Courts. This Order, filed with the case papers, clearly satisfied the rule.

5. Because the Commonwealth petitioned the *Court* to select a magistrate to hear the case, the defendant's allegation of "forum or judge shopping" appears unfounded. *See Commonwealth v. Shaheen, supra* at ——, ——n.6, 390 A.2d at 1296 n.6, *aff'd sub nom, Commonwealth v. Ryan*, 484 Pa. 602, 400 A.2d 1264 (1979).